



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
GILBERT AND DENISE MELLE)

For Appellants: Bernard C. Grace
Certified Public Accountant

For Respondent: John R. Akin
Counsel

O P I N I O N

This appeal is made pursuant to **section** 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Gilbert and Denise Melle against a proposed assessment of additional personal income tax and penalty in the total amount of \$516.55 for the year 1975.

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The appellant does not contest the imposition of a 25 percent penalty for failure to provide requested information. The sole issue presented is whether respondent properly disallowed a portion of the appellants' claimed deduction for a contribution to a self-employed pension plan in 1975.

Appellants, residing in Malibu, California, filed a joint personal income tax return for 1975. "Appellant" herein refers to Gilbert Melle.

Appellant is a musical composer and director. During 1975 he was employed in those capacities by various **television and** motion picture studios. From five of these employers, he received compensation totaling \$37,552, from which amounts **were** withheld for state and federal income taxes, state disability insurance contributions and FICA. These amounts were reported by the employer-studios on Wage and Tax Statements (W-2'S).

On his 1975 return appellant included that \$37,552 in his "**gross** receipts" on Schedule C, Profit (or Loss) from Business or Profession, treating the amount as proceeds from independent contracting. The schedule reflected "Net Profit" of \$45,941; which appellant used as the basis for his claimed deduction of \$4,594 (10% of \$45,941) **for a** contribution to a **self-**employed pension plan.

Respondent audited appellants' return in 1977. When requested additional information regarding the pension plan contribution was not received, respondent issued a notice of proposed assessment, disallowing all but \$839 of the pension' contribution deduction and assessing a 25 percent penalty for failure to provide requested information. Respondent had determined appellant's income from self-employment to be \$8,389 by subtracting the amounts shown on the studios' **W-2's** from the **net** profit shown on appellant's Schedule C. It allowed 10 percent of the resulting\ amount as a deduction for a self-employed pension plan contribution. Appellant protested, but provided no further information, so respondent affirmed its action and this timely appeal followed.

Under section 17524 of the Revenue and Taxation Code, a self-employed individual may deduct the lesser of \$2,500 or 10 percent of his **earned income** as a contribution to a qualified pension plan. "Earned

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income" means the net earnings from self-employment. (Rev. & Tax. Code, § 17502.2, subd. (b); Int. Rev. Code of 1954, § 1402(a).) A contribution deduction, therefore, may only be based on earnings from self-employment and is limited to 10 percent of those earnings, up to a maximum contribution of \$2,500.

Appellant takes the position that he was an independent contractor as to all his employers rather than an employee, so his earnings were all from **self-employment**. Therefore, he contends, his total "net profit" was the correct basis for determining his allowable contribution deduction.

It is well settled that respondent's disallowance of a deduction is presumed correct and the taxpayer bears the burden of proving he is entitled to a deduction. (Appeal of Nake M. Kamrany, Cal. St. Bd. of Equal., Feb. 15, 1972; Appeal of Donald D. Harwood, Cal. St. Bd. of Equal., July 26, 1978.) **Unsupported assertions** are insufficient to overcome the presumption in favor of respondent (Appeal of Shirley Mark, Cal. St. Bd. of Equal., Aug. 16, 1979), and appellant must furnish reasonable proof in support of his deductions. (Appeal of Peter-F. and Betty H. Eastman, Cal. St. Bd. of Equal., May 4, 1978.)

In order to be entitled to the deduction claimed, appellant herein must show that his earnings were from self-employment. He has asserted that he was an independent contractor, but has submitted only part of one contract with one of his employers. Without the exhibits to the contract, which are stated to supersede any contrary provisions in the contract, we cannot say that this document proves that appellant was an independent contractor as to that particular employer. No evidence at all has been produced regarding appellant's relationships with his other employers. Under the circumstances, appellant has not overcome the presumption that respondent's determination **as to his employment status**, which is supported by the W-2 forms, is correct.

For the reasons stated above, we sustain respondent's action.

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ORDER

Pursuant to the views expressed in the opinion of the board on 'file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Gilbert and Denise Melle against a proposed assessment of additional personal income tax and penalty in the total amount of \$516.55 for the year 1975, be and the same is hereby sustained.

Done at Sacramento, California, this 28th day
of October, 1980, by the State Board of Equalization,
with Members Nevins, Reilly, Dronenburg and Bennett present.

Richard Nevins, Chairman

George R. Reilly, Member

Ernest J. Dronenburg, Jr. , Member

William M. Bennett, Member

_____, Member